Supreme Court, U.S.
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No. 00-507

IN THE

Supreme Court of the United States

THE CHICKASAW NATION and
THE CHOCTAW NATION OF OKLAHOMA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF ON THE MERITS FOR PETITIONERS

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PROPOSITION ONE

THE GOVERNMENT HAS NOT REBUTTED THE NATIONS' SHOWING THAT EVEN IN CASES IN WHICH A FEDERAL TAX EXEMPTION IS IN ISSUE, THE INDIAN-LAW CANONS OF CONSTRUCTION MANDATE CONSTRUCTION OF TEXTUALLY-AMBIGUOUS INDIAN-LAW-RELATED FEDERAL STATUTES IN THE MANNER MOST FAVORABLE TO TRIBAL INTERESTS ABSENT CLEAR LEGISLATIVE HISTORY SUPPORTING A CONTRARY CONCLUSION.

A. The Government Has Through Silence Conceded Two of Petitioners' Canons-Related Contentions.

The Nations essentially made four points with reference to the canons in their opening brief. *First*, the Nations demonstrated that the deeply-rooted Indian-law canons mandate the construction of ambiguous federal statutes in the manner most favorable to tribal interests unless clear legislative history compels a contrary conclusion. Pet. Br. 12-14. *Second*, the Nations established that Congress specifically intended that those principles apply to the construction of the Indian Gaming Regulatory Act [IGRA]. *Id.* at 14. *Third*, the Nations demonstrated that the general tax-exemption maxim on which the Government relies is weak as a relative matter, and that although this Court has sometimes described it as requiring an unambiguous statement to *create* a tax exemption (and has occasionally said so — in dictum — even in Indian-law cases), in none of its cases has this Court held the general tax-exemption maxim to supersede the Indian-law canons in a case involving an *actual textual ambiguity*. *Id.* at 15-27. *Fourth*, the Nations pointed to case law from this Court demonstrating that the first and third interpretive principles apply no differently in cases involving asserted tribal immunities from *federal* taxation than they do in cases involving federal-authorization-of-*state* taxation

issues. *Id.* at 17-20. While the Nations will confront directly the responses that the Government does make, a few brief observations about what the Government does *not* contest may help to contextualize the "canons" issues at this stage of the litigation.

First, the Government does not deny that this Court's Indian-law canons require that:

> When we are faced with these two **possible** constructions, our choice between them must be dictated by a principle rooted in this Court's Indian jurisprudence: "[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."

County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 269 (1992) (emphasis added) (citation omitted). *Compare* Pet. Br. 13-14, *with* Resp. Br. *passim*.

Second, the Government has conceded through silence the Nations' contention that not only was Congress *constructively* aware of the Indian-law canons in the IGRA drafting process, but that it affirmatively intended those canons to control ambiguous provisions of that Act. *Compare* Pet. Br. 14, *with* Resp. Br. *passim*.

But the Government *does* take issue with two of the Nations' contentions that focus exclusively on the canons. The first concerns the hierarchy of the particular Indian-law canon at issue *vis-à-vis* the general tax-exemption maxim (and in the latter case, its precise contours); the second challenges the interchangeability of federal-tax exemption and federal-authorization-of-state-taxation case law for Indian-law canons purposes. The Nations will now demonstrate that the Government has made no headway on those points.

B. The Government's Attempt to Rebut the Primacy Of The Indian-Law Canon Over The General Tax-Exemption Maxim In Cases Involving Actual Textual Ambiguity Fails.

With respect to the relative positioning of: (1) the relevant Indian-law canon; (2) the general tax-exemption maxim; and (3) what the Government characterizes as the "traditional tools" of statutory construction, careful examination of the Government's brief will reveal that it has simply failed to effectively engage (and in some instances to engage at all) the Nations' detailed analysis of a century of this Court's case law.

Initially, the Government admits that the particular canon at issue is "eminently sound and vital," Resp. Br. 22, and that it at least "might" be applicable if 25 U.S.C. § 2719(d)(1) were "genuinely susceptible of the construction Petitioners seek to place on it," Resp. Br. 23. By agreeing to those propositions without having challenged this Court's *County of Yakima* standard, *see supra* at 2 (quoting same), the Government has effectively agreed that the canon should be employed if the Nations' proffered construction is *possible*[1] — at least (in its view) after applying the other so-called "traditional tools." The Nations will demonstrate in Proposition Two both that the construction advanced by the Nations, the Federal Circuit[2] and IGRA's primary Senate

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1. As a related matter, the Government's assertion that Petitioners "scarcely contest" that the Government has the better of the "traditional tools" argument — *based on Petitioners' phraseology of the issue under the burden that Petitioners maintain they must meet*, *see* Resp. Br. at 28 n.13 — is nothing more than a *non sequitur*, and a counter-factual one at that.

2. *Little Six, Inc. v. United States*, 210 F.3d 1361 (Fed. Cir. 2000).

author is "possible," and that the "traditional tools" do not clearly resolve the textual ambiguity in the Government's favor.[3]

However, it is the Government's attempt to exalt the general tax-exemption maxim at the expense of the relevant Indian-law canon that most patently demonstrates the Government's profound failure to come to grips with the Nations' careful doctrinal analysis. Even a cursory comparison of the treatment afforded to the relevant case law by the parties will quickly reveal the extent to which the Government simply repeats general arguments and citations that Petitioners have already specifically rebutted in detail. *Compare* Pet. Br. 15-27, *with* Resp. Br. 22-27.[4]

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3. Because the Nations will make such a showing, the Government's reference to *Ratzlaf v. United States*, 510 U.S. 135 (1994), *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992), and *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498 (1986), *see* Resp. Br. 28, is unavailing. It cannot be legitimately claimed, as a purely textual matter, either that Section 2719(d)(1) is "clear," *Ratzlaf*, 510 U.S. at 147-48, or that the Nations seek to rely on "ambiguities that do not exist," *Catawba*, 476 U.S. at 506 n.16.

4. For example, the Government incorrectly implies that tax-exemptions in favor of Indian tribes can never arise from textual ambiguity. Resp. Br. 16. As *Choate v. Trapp*, 224 U.S. 665 (1912), *Squire v. Capoeman*, 351 U.S. 1 (1956), *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985), confirm, the Government is wrong. *See* Pet. Br. 15-21. For almost a century this Court has applied the relevant Indian-law canon to the textual ambiguity of federal statutes that arguably create exemption for Indians from both federal and state taxation, the general tax-exemption maxim notwithstanding.

C. The Government's Attempt For Canons Purposes To Distinguish This Court's Tribal-Immunity-From-Federal-Taxation Authority From Its Federal-Consent-To-State-Taxation Authority Also Fails.

In establishing the primacy of the particular Indian-law canon over the general tax-exemption maxim in cases of textual ambiguity, the Nations developed two lines of argument. First, they proffered a precedent-based approach, noting, for example, that in *Squire v. Capoeman*, 351 U.S. 1 (1956), which dealt with an asserted tribal exemption from *federal* taxation, this Court invoked its *state*-taxation "canon" case law, *see id.* at 6-7 (quoting *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)), as fully interchangeable. Pet. Br. 18-19. Moreover, the Nations then noted that this Court has subsequently cited *Squire* in federal-authorization-of-*state* taxation cases, Pet. Br. 19-20 & nn.7, 8 (citing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 175-76 (1973), and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 155-56 (1973)), thus demonstrating that the interchangeability of the case law is complete, and that it operates in both directions.

Second (and perhaps equally fundamentally), having noted that the Indian-law canons are federal-trust-responsibility based, Pet. Br. 13-14, the Nations pointed to this Court's *specific* application of a subspecies of the trust-responsibility policy to tribal assertion of *federal* tax exemption based on ambiguous statutory language. *Id.* at 19 (quoting *Squire*, 351 U.S. at 8: "*[I]t is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian.*" (emphasis added)). *See also id.* at 19 n.7 (citing additional authority in support of the quoted proposition).

Although the Government attempts to reply to both the precedent-based and policy-based assertions of the Nations, its efforts misfire. As to the precedent-based approach, the

Government can do little more than attempt to distinguish *Squire* as merely a "traditional tools" case, *see* Resp. Br. 23 & n.8, while perhaps failing to fully apprehend either: (1) that the Nations do not dispute the relevance of such tools where they *clearly* resolve textual ambiguity, *e.g.*, Pet. Br. 12 (Petitioners' Proposition I); or (2) that in *Squire*, this Court found a residual unresolved ambiguity, invoked the canon relied upon by the Nations, and rejected precisely the approach now tendered by the Government to this Court, *see* Pet. Br. 18 (quoting *Squire*).

On the Nations' "policy" (*i.e.*, trust-relationship) point, the Government notes that the specific subspecies of the general trust-responsibility policy that supports the Indian-law canons as a whole differs slightly in the federal-authorization-of-state-taxation arena[5] from the specific subspecies of that general policy on which this Court grounded the canons' applicability to the federal-tax-exemption context in *Squire*. Resp. Br. at 25-26. But the Government's observations in no way undermine this Court's independently-dispositive pronouncements: (1) that the *general* trust-relationship notion that supports the Indian-law canons *as a cumulative matter* remain "eminently sound and vital," *see* Pet. Br. 14 (citing *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976)); and (2) that a powerful *subspecies* of trust-relationship policy *independently* supports the specific applicability of those canons to statutorily-grounded tribal exemption from *federal* taxation, *supra* at 5 (quoting *Squire*). Against that backdrop, the Government's ultimately irrelevant observation that the subspecies of trust-responsibility policy that provides redundant support for the

5. In the federal authorization-of-state-taxation context, the Government notes that the relevant subspecies of general trust-responsibility policy is "leaving Indians free from state jurisidction and control. . . ." Resp. Br. 26 (quoting *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 168 (1973)).

canons' applicability to state-taxation authorizations is *different* from the one that provides redundant support for their applicability to federal tax exemptions falls well wide of the mark.

PROPOSITION TWO

THE GOVERNMENT HAS NOT MET ITS BURDEN OF DEMONSTRATING EITHER THAT 25 U.S.C. § 2719(d)(1) IS TEXTUALLY UNAMBIGUOUS, OR THAT THE LEGISLATIVE HISTORY OR PURPOSES OF IGRA CLEARLY RESOLVE THE TEXTUAL AMBIGUITY IN ITS FAVOR.

A. The Government Does Not Deny That 25 U.S.C. § 2719(d)(1) Is Facially Ambiguous.

Petitioners' showing of the textual ambiguity in Section 2719(d)(1) remains unrebutted by the Government. Although the Government goes to great lengths to avoid directly admitting that textual ambiguity, nowhere in its brief does the Government actually deny the ambiguity.[6] Likewise, the Government does not, and cannot, state that the provision is unambiguous. That refusal to crisply join the issue speaks volumes.

6. The Government's efforts to avoid conceding the ambiguity include: ". . . the parenthetical reference to Chapter 35 on which Petitioners rely is perhaps more accurately described as a 'mystery' rather than an 'ambiguity', " Resp. Br. 22 n.7; "[t]he Court of Appeals for the Federal Circuit considered the reference 'ambiguous' for the same reason. *Little Six*, 210 F.3d at 1365. We agree that 'Chapter 35' is not a particularly apt example to use to illustrate the scope of the operative text," Resp. Br. 14; ". . . the text at issue here is merely one of a series of unexplained cross-references in an illustrative parenthetical," Resp. Br. 15; and four references to Section 2719(d)(1) as "cryptic," Resp. Br. 8, 9, 14, 22.

B. The Government's Attempts To Demonstrate That 25 U.S.C. § 2719(d)(1) Is Not "Genuinely Susceptible" To The Nations' Construction Are Unavailing.

1. The Nations' construction of 25 U.S.C. § 2719(d)(1) is not only "possible," but also gives effect to every word of that provision.

The Government incorrectly contends that Section 2719(d)(1) is not "genuinely susceptible" to the construction made by the Federal Circuit and Senator Inouye[7] and urged by

7. Rather than addressing the substance of the Nations' reasoning (and supporting authority) as to why the statement of Congressional intent by IGRA's primary Senate author should be given interpretive weight, *see* Pet. Br. 38-40 n.25, the Government instead seeks to deflect the impact of Senator Inouye's statement because in referencing § 2719(d)(1), his letter omitted an ellipsis. *See* Resp. Br. 19 n.5. That omission should in no way diminish the force of the Chairman's statement earlier in his letter that Congress intended "that the tax treatment of wagering conducted by tribal governments be the same as that for wagers conducted by state governments under Chapter 35 of the Internal Revenue Code" and that

> [b]ecause the purpose of wagers for both tribal and state governments is to provide for the general welfare of their citizens, it was the view of the Congress that to impose a higher rate [of taxation] upon tribal government-conducted gaming activities [than that imposed upon state government-conducted gaming activities] would be unfair.

Letter from Sen. Daniel Inouye, Chairman, Senate Select Committee on Indian Affairs, to Hon. Fred T. Goldberg, Jr., Commissioner, Internal Revenue Service, Dec. 12, 1991. App. p. 112a (bracketed material added). Senator Inouye's statement of congressional intent is completely consistent with the Nations' construction of (and giving effect to) every word of Section 2719(d)(1), including those elided words omitted from the quotation in the Chairman's letter. It is that consistency, along with the author's status as IGRA's primary author, that gives value to his remarks concerning congressional intent.

the Nations. *See* Resp. Br. 23. The careful reading of each word of the statutory text confirms that the Nations' construction, at the very least, meets (and in reality exceeds) the "possible construction" standard of *County of Yakima* for application of the relevant Indian-law canon in the Nations' favor.

Section 2719(d)(1) provides as its general subject "the provisions of the Internal Revenue Code of 1986" that "shall apply to Indian gaming operations" . . . "in the same manner as such provisions apply to state gaming and wagering operations." The statutory text narrows that general subject by operative language that can easily be read as identifying the *two* parts of the general subject to be made applicable to tribal gaming, as the additions of bracketed letters (to facilitate the illustration) demonstrate:

> . . . **concerning** [a] the reporting and withholding of taxes with respect to the winnings from gaming **or** [b] wagering operations . . .

25 U.S.C. § 2719(d)(1) (emphasis added and bracketed material added.)

That reading of the text, turning on the words "concerning" and "or," gives meaning not only to *every* word of the statute, including each word of the parenthetical phrase containing IRC Chapter 35, but also explains the exact placement of the parenthetical phrase as a descriptive modifier immediately after the general subject.[8] By using the disjunctive "or," Congress can be said to have divided into two parts those provisions of the IRC which it made applicable to Indian gaming — (a) those IRC provisions concerning reporting and withholding of taxes with respect to winnings by players, and (b) those IRC provisions

8. *See, e.g., United States v. Monjaras-Casteneda*, 190 F.3d 326, 329 (5th Cir. 1999) (explaining a parenthetical placed directly after a word as descriptive rather than limiting).

concerning the wagering operation itself. "Or" emphasizes the separate natures of those two applicable portions of the IRC. Each of the parenthetical phrase's constituents fits into either the first or the second group. IRC Sections 1441, 3402(q), and 6041 each deal with reporting and withholding of winnings. The last two parenthetical constituents, IRC Section 6050I and Chapter 35 (separated from the prior three IRC Sections by the significant word "and"), while having nothing to do with the reporting and withholding of winnings, do in fact apply to wagering operations[9] — that second part of the IRC expressly made applicable to Indian gaming by Section 2719(d)(1).[10]

The Nations' construction of the statute reads no words or phrases out of the congressional text as "surplusage." Particularly, the construction gives vitality to each specific provision of the IRC contained in the parenthetical phrase,

9. IRC Section 6050I requires not that the wagering operation report payments made *to* winning players, but rather that the wagering operation report payments to it *by* players. *See* Resp. Br. 14. Likewise, no doubt exists that IRC Chapter 35 applies to wagering operations.

10. The Government's argument that the Nations' construction is not possible should be rejected, among other reasons, as based on a false premise. Throughout that argument, the Government omits from its consideration Section 2719(d)(1)'s operative statutory language "or wagering operations." *See* Resp. Br. 7, 12, 15. By so doing, the Government makes an incomplete analysis on the erroneous basis that Section 2719(d)(1) contains only one "central textual command." *See* Resp. Br. 8, 14. As the Nations have shown, the complete statutory text actually contains *two* "central textual commands." Each parenthetical example can be read to illustrate one or the other textual command. Having begun with a false premise that relies on the irrelevance of the independent clause "or wagering operations," *cf.* Resp. Br. 12, 13, 27 (selectively quoting from the text of Section 2719(d)(1)), the Government wrongly draws the false conclusion that the textual references to IRC Section 6050I and Chapter 35 should be read out of Section 2719(d)(1) as aberrational.

rather than erasing some provisions as the Government urges. The construction recognizes the separation of the first three IRC provisions (dealing with winnings) from the last two (dealing with wagering operations) made by the use of "and" within the parenthetical. Only that reading uses the parenthetical phrase for its proper purpose — a descriptive modifier of the subject of the statute (those provisions of the IRC that shall apply to Indian gaming operations). Only the Nations' approach explains the location of the parenthetical after the general subject. Only that construction makes sense of (and gives effect to) the use of "or," and thereby prevents "wagering" (which that disjunctive "or" separates from "gaming") from becoming redundant surplus.

The Nations' review of Section 2719(d)(1)'s text, on which the Government primarily stakes its claim of no exemption, more than demonstrates that the text supports the Nations' **possible construction**. That showing effectively rebuts the Government's assertion that Section 2719(d)(1) is "not generally susceptible" to the Nations' construction, and satisfies (and in reality exceeds) the *County of Yakima* standard for application of the Indian-law canon in the Nations' favor.

2. The constructions of 25 U.S.C. § 2719(d)(1) proffered by the Government not only fail to diminish the "possibility" of the Nations' construction, but also are not credible.

The Government's ill-founded attempts to "explain away" the inclusion of IRC Chapter 35 in Section 2719(d)(1) do not diminish the possibility of the Nations' construction. The Government's weak sponsorship[11] of the Tenth Circuit's

11. In discussing the Tenth Circuit approach, the Government tellingly employs the distancing phrase "could perhaps be instructive." Resp. Br. 14.

suggestion that Chapter 35's reference could be harmonized with the operative text by proffering that Chapter 35 was inserted to incorporate 26 U.S.C. § 4421's definition of "wagers" and "lotteries," Resp. Br. 14, completely ignores the reasoned rejection of that very suggestion contained in *Little Six, Inc. v. United States*, 229 F.3d 1383, 1394 (Dyk, J., dissenting to denial of rehearing en banc), quoted earlier by the Nations, Pet. Br. 9. The fact remains that nothing with extra-Chapter 35 consequences could have been gained by an inclusion for that purpose, since the Section 4421 definitions expressly apply only for the purposes of Chapter 35 itself. Likewise, the Government's claim that the Chapter 35 reference was intended to invoke IRC Sections 4403 and 4412 (but not the exemption-granting Section 4402) is impeached by the very subjects of those two sections, which have nothing to do with the reporting and withholding of winnings by players, as the Government itself notes. *See* Resp. Br. 15.[12]

Finally, the Government's unusual and surprising argument, unsupported by any citation to an opinion of this Court, that the references to IRC § 6050I and Chapter 35 should simply be "read out" of Section 2719(d)(1) is untenable, particularly in light of the Nations' possible construction. Although the "reading out" of text troublesome to the Government without resort to any applicable canon of construction, might be a "far easier" way to resolve every ambiguity in any case, *see* Resp. Br. 16 (so suggesting), such is not the law, particularly in the Indian-law context. The Government's capitulation in the search for textual meaning, ill-founded on a false premise, *see supra* at 9 n.8, neither diminishes the force of the Nations' construction nor renders that construction impossible.

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12. IRC Section 4403 requires persons liable for excise tax to keep daily records of the gross amounts of wagers. IRC Section 4412 requires the registration of employees subject to occupational tax.

C. The Government Has Failed To Demonstrate That The Legislative History Of IGRA Clearly Resolves The Textual Ambiguity In Its Favor.

Of particular import, the Government fails to identify any explanations in any legislative committee report, legislative committee testimony or floor debate as to why Congress included the ambiguity-creating reference to IRC Chapter 35 in Section 2719(d)(1).[13] Likewise, the Government offers no explanations as to why the **substitution** of the specific exemption-containing Chapter 35 for the general taxation language in S.555, 100th Cong. (1987), occurred. Rather, the Government goes to great length to avoid addressing the legal effect of that substitution by inappropriately characterizing the committee action as simply a "deletion." The Government consequently fails to effectively respond to Petitioners' distinguishing of *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974), and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), Pet. Br. 32-33, on the grounds that the "deletion" principle should have no application to the substitution here. Likewise, the Government completely ignores this Court's Indian-law case

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13. The Government's speculation as to why the ambiguity exists, *see* Resp. Br. 17-18, should be ignored since, as the Government itself notes, "such speculation is not a firm basis for statutory interpretation," *id.* at 18. The Government's invocation of the Origination Clause, U.S. Const. art. I, § 7 (as mentioned by the *Little Six* dissent to denial of rehearing en banc, *Little Six*, 229 F.3d at 1385), not only explains nothing concerning the textual substitution but also is ill-founded. As this Court explained in *Twin City National Bank v. Nebecker*, 167 U.S. 196, 203 (1897), when the main purpose of an act is other than raising revenue, it is not subject to challenge under the Origination Clause. In discussing IGRA's purposes, *see* Resp. Br. 20 n.6, the Government has not suggested that IGRA's main purpose was raising revenue.

of *Oklahoma Tax Commission v. Barnsdall Refineries, Inc.*, 296 U.S. 521 (1936), where even the deletion of language in the final draft of the statute was not held to be dispositive. *See* Pet. Br. 33 n.21 (discussing *Barnsdall Refineries*). The Government's failure to address the Petitioners' distinguishing of the three decisions advanced by the Government, and its ignoring of the *Barnsdall Refineries* case, further undermine the Government's legislative-history argument.

At the end of the Government's legislative-history analysis, the conclusion remains that the substitution of the exemption-containing IRC Chapter 35 for the prior general reference to taxation does not resolve against the Nations the textual ambiguity with that clarity needed to avoid the application of the Indian-law canon. The Petitioners' analysis of the legislative history as non-outcome-determinative remains unrebutted.

D. The Government Has Not Rebutted The Nations' "Motivating Purpose" Demonstration That Their Construction Of Section 2719(d)(1) Is Consistent With And Materially Advances Important Federal Indian Policies Embodied In IGRA.

The Government misapprehends the purpose of the Nations' discussion of the important federal policies embodied in IGRA. The Petitioners do not analyze those policies for the purpose of urging this Court to create a tax-exemption from pure public policy untethered to statutory text. The Nations well know that pure policy without textual ambiguity is insufficient to create a tax-exemption in the face of the general tax-exemption maxim. *See* Pet. Br. 21-27. Rather, the Nations invoke IGRA's policies to demonstrate that the construction resulting from the application of the Indian-law canon to Section 2719(d)(1)'s

ambiguity is consistent with, and materially advances, those policies embodied in IGRA.[14]

The Government does not deny that the application of the Indian-law canon results in a construction of Section 2719(d)(1) that is consistent with the motivating purposes and legal context of federal Indian policy embodied in IGRA. In fact, the Government directly acknowledges that one of IGRA's purposes is "to ensure that gaming benefits flowed primarily to tribes." Resp. Br. 20 n.6. The Nations' construction in favor of the exemption fosters that very purpose by ensuring that gaming benefits represented by the disputed tax amounts flow to tribes. The Government does not dispute that IGRA's policies include strengthening tribal self-government, breaking dependence on federal support, and increasing tribal sufficiency and support for tribal welfare programs. The Government does not dispute that the Nations' construction is consistent with those motivating purposes and legal context. Not surprisingly, the Government points to nothing that suggests that one of IGRA's motivating purposes is to raise federal revenues at the expense of those clearly-recognized, congressionally-encouraged tribal interests, by taxing the ward for the benefit of the guardian.

Likewise, the Government offers no response to the Nations' related observations that Congress was well aware that tribal and state gaming would be conducted for identical purposes, that tribes and states would effectively be competitors, that nothing in IGRA's legislative history suggests any intent to impose an artificial competitive disadvantage on tribal gaming, and that the Nations' statutory construction would avoid such an unintended result. *See* Pet. Br. 38.

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14. The Government's assertion of the importance of statutory "motivating purposes or legal context," Resp. Br. 27, actually invites the very policy analysis performed by the Nations.

The Government's suggestion that Congress could have amended either IRC Chapter 35 or the Indian Tribal Governmental Tax Status Act of 1982, Pub. L. No. 97-473, tit. II, § 202(a), 96 Stat. 2607, 2608 [ITGTSA], to provide an express exemption, changes nothing as to the accuracy of the Nations' policy ("motivating purposes or legal context") analysis. The critical fact remains that Congress expressly chose to address the IRC ramifications of IGRA through IGRA itself, rather than by amending specific sections of the IRC including that portion of the IRC created by ITGTSA. By using IGRA as the vehicle to address IRC application, Congress has relegated to legal irrelevancy the Government's invocation of the IRC and ITGTSA to attempt to overcome IGRA's purpose of allowing tribes to increase their revenues for operating their tribal governments and related programs. The fact that the IRC and ITGTSA were not specifically amended to provide the exemption conferred through IGRA neither erases Section 2719(d)(1)'s textual ambiguity, explains the insertion of IRC Chapter 35 into that text, renders the Indian-law canon inapplicable, nor impeaches the Nations' policy analysis.[15]

15. The "contextual backdrop" of both the wagering-tax provision and ITGTSA suggested by the Government does nothing to diminish the Nations' construction. Nowhere does the Government indicate, by either the words of those statutes or their respective legislative histories, which were utterly silent about tribal gaming, that Congress considered tribal gaming in making those enactments. *See* Revenue Act of 1951, Pub. L. No. 82-183, ch. 521, § 471, 65 Stat. 452, 529-32 (codified as amended in IRC Chapter 35, 26 U.S.C. § 4401 *et seq.*); Indian Tribal Governmental Tax Status Act of 1982, Pub. L. No. 97-473, tit. II, § 202(a), 96 Stat. 2607, 2608 (codified as amended in 26 U.S.C. § 7871(a)(2); H.R. REP. No. 82-586 (1951), *reprinted in* 1951 U.S.C.C.A.S. 1781, 1837-44; S. REP. No. 82-781 (1951), *reprinted in* 1951 U.S.C.C.A.S. 1969, 2065, 2089-96; S. REP. No. 97-646 (1982), at 8-17, *reprinted in* 1982 U.S.C.C.A.N. 4580, 4586-95; H. CONF. REP. (Cont'd)

The combined effect of the Government's emphasis on "motivating purpose or legal context," the Government's failure to dispute the Nations' policy-analysis conclusions as to those motivating purposes, and the Government's admission that one of IGRA's purposes is to "ensure that the gaming benefits flow primarily to the tribes" is patent. The Nations' assertion that their construction of Section 2719(d)(1) is consistent with, and materially advances, important IGRA policies remains unshaken.

CONCLUSION

The Judgments of the United States Court of Appeals for the Tenth Circuit should be reversed so that the Nations, pursuant to 25 U.S.C. § 2719(d)(1), may have the benefit of the tax exemptions afforded to their state governmental-gaming competitors by IRC Chapter 35.

(Cont'd)
No. 97-984 (1982), at 11, 15-17, *reprinted in* 1982 U.S.C.C.A.N. 4595, 4601-03. The codification of the entirety of former IRC Chapter 27A (1952) into what is now IRC Chapter 35 (and more) was accompanied by only two paragraphs of virtually identical (and unilluminating) published legislative history. *See* H.R. REP. 83-1337 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4019, 4468; [Unnumbered] S. REP. (1954), *reprinted in* 1954 U.S.C.C.A.N. 4621, 5127.

That absence of documented Congressional concern about tribal gaming in that legislation is understandable since no tribe would enter the bingo industry until 1979. *See* S. REP. No. 100-446 (1988), at 2, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3072 ("The Seminole Tribe of Florida in 1979 was the first tribe to enter the bingo industry."). That legislative silence prevents any inference from that "contextual backdrop" as to the intent that motivated the enactment of Section 2719(d)(1).

Respectfully submitted,

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